



## A Conversation with Philip Alston about Transitional Justice and Development

Conducted by Pablo de Greiff and Roger Duthie, ICTJ, May 21, 2009

In the summer of 2009, ICTJ's Research Unit completed a major research project on the relationship between transitional justice and development, two fields that until now have proceeded in isolation from one another. The results of the project were recently published in the edited volume, *Transitional Justice and Development: Making Connections* (SSRC, 2009). In May, Pablo de Greiff and Roger Duthie, the book's editors, sat down with Philip Alston to discuss some of the project's main conclusions.

Philip Alston is the John Norton Pomeroy Professor of Law at New York University School of Law and co-chair of the NYU Center for Human Rights and Global Justice. He is the United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions. He has been Special Adviser to the UN High Commissioner for Human Rights on the Millennium Development Goals since 2002, and chaired the UN Committee on Economic, Social, and Cultural Rights for eight years until 1998. His many publications include *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press, 2005) (ed. with Mary Robinson).

**Pablo de Greiff:** The question that perhaps captures the broadest formulation of our interest in this topic is: What is it that working in transitional justice related areas contributes to processes of development?

**Philip Alston:** I wonder if there may be a spectrum that starts at one end with legalism, the traditional approach to human rights. A lot of human rights practitioners would say that human rights has very specific norms, institutions, and procedures, and that it doesn't need to invoke abstract standards of justice, which are manipulatable, contingent, and contested. At the other end of the spectrum is development, which is a set of fairly amorphous objectives designed to improve human capabilities, wellbeing, or functioning, very broadly defined and so all encompassing that it can never be satisfied by definition, because it is an ongoing process. In the middle, you have a conception of justice that is neither the narrow, more technical legalism of the majority of human rights practitioners nor the very open-

ended conception of development. Transitional justice looks to meet human rights objectives, but it is more pragmatic in the sense of offering a broader array of measures and programs than those of classical human rights work heavily centered on criminal justice, presupposing of course that the required institutions are in place, that there is already a certain level of civic trust, and a (newfound) preference for respecting human rights. Transitional justice is more flexible, prepared to use law when it seems useful and viable, but also to expand the repertoire of responses beyond traditional legal approaches.

This means that transitional justice is going to move in both directions, trying to restrain the other two extremes. It says to the human rights people that they have to be more flexible in order to obtain objectives; that they have to see any given human rights norm in its broader context. In relation to development, rather than embracing the fullness of the whole development agenda, transitional justice reaches out to a more limited one, saying that there are notions of justice here which relate to the transition from a past to a future. Development, despite recent conceptual progress, is usually pretty future oriented, without doing too much diagnosis of the ills of society in the past. It instead tends to put the past behind it, saying, we know about that but let's look ahead, and perhaps do a five-year plan. Transitional justice says that you have to look backwards as well in order to know where to go and how to get there.

**de Greiff:** Should development agents be concerned about redressing human rights violations? Doing so would be a way of counterbalancing the future orientation that, in this conversation, we are attributing to development actors. But why should they care about this? What would be wrong with them saying, five-year plans are fine, that's what we need?

**Alston:** I don't think you will be able to persuade them of the entirety of your agenda. In essence, though, there are two sets of arguments—principled and instrumentalist. The principled arguments are going to look much more like human rights arguments: that it is essential for the individual—for dignity, for recognition, etc.—to receive certain forms of justice and compensation. But the instrumentalist arguments are based on healing society, on addressing the deepest wounds and pathologies that have been given to the present by the past—if you ignore those problems, you are not really going to be able to move ahead, to mobilize society to address the deepest concerns of people.

**de Greiff:** An alternative way of thinking about this is to say that transitional justice is very concerned about some of the institutional dimensions and preconditions of a more formalistic understanding of rights. The answer, from that perspective, to why development agents should care about the past doesn't only have to do with healing at the micro-level, but also with the possibility of institutionalizing systems of rights effectively. In other words, development has to be mindful of the past because it leaves institutional traces, practices, and habits, and institutional design in that setting happens in a skewed way which has to itself be counterbalanced. Do you think that this sort of argument would carry any traction?

**Alston:** I think it certainly should. Many development practitioners are not interested in looking back because that all seems too complex and too controversial. It is much easier to give a government minister a proposal as to how to move ahead, even knowing that the minister has been complicit in a whole range of practices that are highly problematic. But that proposal is not going to have broad-based support because people know that it is not designed to address what they understand as the real pathologies in society.

One of the most important things for me, although it certainly doesn't go to the far development end of the continuum, is the problematic nature of the focus of transitional justice on essentially the political and civil dimensions and not on the economic dimensions of what happened. In the great majority of cases, the motivation for the abuses has not been quintessentially civil and political, ethnic, or racial, it has been economic—the aim is to get, say, one particular ethnicity off the land. To the extent that all you look at are the political violations that took place, you are failing to carefully document the economic consequences and the extent to which those consequences might be very hard to undo.

This is one of the really big issues that transitional justice has to try to come to grips with. I know it raises difficult questions about the whole structure of an economy, and I know the ways in which exploitation and discrimination have an impact on those structures is very hard to trace, but I think in most regimes—certainly in the great majority of the countries that I now work in—those are the biggest issues. They manifest themselves in political, ethnic, and other forms of conflict, but it is all about resources.

**de Greiff:** Truth commissions in Sierra Leone, Timor Leste, and Peru, for example, have in fact addressed the role of things such as natural resources and education in conflict. And there is a strong impetus behind the idea that the mandate of each of the transitional justice measures should be broadened so as to include not just the violation of civil and political rights but the violation of other types of rights as well. There are questions about whether the measures are adequate to that task, but there is certainly a great deal of interest in this in virtually every discussion in transitional justice.

**Alston:** Of course, there is a distinction, at one level, between what I was talking about and respect for economic and social rights. Respect for economic and social rights may be much more relevant in retrospect. In a society such as in South Africa, where deep exploitation and structures were highly prejudicial to economic wellbeing, if you came in with a radical agenda of massive redistribution, state expropriation, and confiscation, most people would agree that this is never going to happen. There are so many political constraints within the country itself, and the international regime puts a large number of limitations on the extent to which you could do this. The solution, then, would be more focused on economic and social rights, not directly linked to a reparations type analogy, but simply acknowledging that

unless there is basic provision for enhanced economic and social capabilities of the masses, the transition is not going to be seen as fair and equitable.

**de Greiff:** This is a crucial distinction, because it circumvents some of the problems associated with potential institutional overload.

**Alston:** It is also a demonstration of the contrast between the legalist approach and the justice approach. The legalist approach is much more concerned with saying that, since this person and his family were dispossessed from significant tracts of land, and beaten so badly that X members of the family are disabled, he needs to get not just recognition but specific reparations. You multiply that by a hundred thousand, or by a million, however, and it is off the charts in terms of what is possible. The money simply is not there for those sorts of reparations a million times over. It is a good example of where transitional justice has to come and say, look, pursuing the formal reparations notions that are now evolving within the human rights regime—which have to be individual based because that is what human rights are about—is not going to work. We instead are focusing on transitional measures to move away from the past. Although, I should add that the European Court of Human Rights is in fact exploring such approaches with its pilot judgment jurisprudence which was developed in a transitional justice type context involving the property rights of those dispossessed under the Communist regimes in eastern Europe.

**de Greiff:** So the question is whether working on the sorts of issues and measures that transitional justice promoters typically defend can be argued to, at least in theory, potentially contribute to putting on the agenda economic and social rights, not necessarily in a retributivist perspective, but in a forward-looking perspective that may turn out to be very important not just for the achievement of the development goals but also for the institutionalization of justice claims and procedures of the more legalistic sort.

**Alston:** Yes, I agree with that. And that is why transitional justice fits in the middle of the spectrum: it contributes in a sense to both of these two things. It is a halfway house for human rights, because you can't do the case by case assessment of individual harms for a whole range of reasons, not just the pragmatic and not just the financial reasons—it is just not going to be helpful, it is going to take too long, and there are going to be very many great disparities. By the same token, to the extent that you are acknowledging that the authoritarian or oppressive regime also skewed financial allocations radically and caused deep economic injustice, you are coming up with a development agenda which is trying to address some of those issues, trying to link it back to the original human rights-based complaints, but not necessarily through a traditionally human rights-based approach.

**de Greiff:** It is in the overlap between claims of mutual interest in questions about root causes that the debate about transitional justice and development and their linkages can also be located. Part of the question is how to take root causes seriously, not just as an object of

examination but also the ways in which the programs are adequate to the task of addressing root causes. It is there that some of the differences and the complementarities between transitional justice and development may be clarified, but from the standpoint of modesty. How seriously do development agents really take historical root causes? And how seriously can transitional justice be said to address the most structural dimensions of the root causes of the conflict?

**Alston:** I would come back to the idea of the spectrum again in answering that, because my sense is that the extremes shed light on the problem. The human rights crowd argues that the centrality of the individual means that there has to be justice for the individual, and there have to be procedures, institutions, and mechanisms of redress for every individual on a case by case basis. At the other extreme, the development crowd looks at the root causes, but the root causes become very detached from the individual. There are broad theories of what went wrong and what issues need to be put into the big mix, but they are usually expressed at a level of abstraction that is very distant from the human rights approach. Transitional justice tries to emphasize that there is some linkage between these two, that under the particular constraints we are operating in a transitional context, we don't have the space for the careful legalistic approach to every individual case. But by the same token, even if you think you have done a really complete and sophisticated analysis of root causes, if it doesn't at some level seek to recognize and address much more directly the experiences of the community and the individuals, then it won't succeed.

**Roger Duthie:** One of the conclusions of our research is that there are opportunities for coordination and mutual learning among transitional justice practitioners and development practitioners working on some of the same issues. As someone who has thought about the potential links both potentially and in practice between human rights and development, what do you think about those sorts of claims?

**Alston:** On the one hand, I am very enthusiastic about the desirability of that sort of interaction and cross-fertilization. On the other hand, it will not happen easily. I see both human rights and development groups and their discourses as "hegemonic": each has its own discipline, and each insists that it has the right framework that will enable us to understand the complex interaction of the different variables. Disciplines and fields tend to become hegemonic exercises trying to show that everything that others do can actually be better understood through the professional lens that we prefer, which then can conveniently confer immense powers on us because we are the ones that get to make all the decisions. So to try to get the two groups—or the three groups if you put transitional justice in the middle—to be speaking the language of the others is much easier said than done. From what I have seen over the years, I am not convinced that the development paradigm has been as significantly influenced by human rights assumptions and insights as much of the literature would claim. I see the development field as still being quite resistant to even undertaking the sort of deeper political analysis that would be required.

**Duthie:** If we think about transitional justice in the middle of this spectrum, though, it could suggest that transitional justice measures might be in a better place than other human rights work to actually make coordination happen. A truth commission, for example, is an actual space where we can bring together people with different view points or expertise.

**Alston:** Right. It has parallels with very old political science notions of functionalism in the sense that you are selling certain functions that are a little more detached than human rights from ideology. If we all agree that there is a transition in process, and that we need to facilitate that transition, the question is about what mechanisms we are going to use—and that gives transitional justice an advantage in terms of not having to stand on narrow principle as much as human rights, and being able to identify specific functions that it can perform. Transitional justice, even though it comes back to a system of rights, is freed from the formal constraints of human rights discourse because it doesn't reduce itself to that. It is a much more pragmatic mentality, as I see it, and is thus able to use the language or the rhetoric in both directions—toward the development group and toward the human rights group—but it is not confined to using either of those. The human rights approach has to talk about specific norms and legal obligations and legal remedies, and the development people will normally eschew most of that and talk in very different, more utilitarian terms. So I think transitional justice does have a big advantage in a more flexible discourse and an ability to reach out to both ends of the spectrum.